Bush v Gore: What Were They Thinking?

David A. Strauss†

There is an old question: does a judge decide how a case will come out, and then find a justification in the law? Or does the judge approach the case with no strong prior inclination and follow the legal materials where they lead? If we confine the question to judges who are reasonably able and conscientious, the answer is surely that cases lie on a continuum between these poles. In some cases judges may have no strong intuitions, and they more or less try to figure out the right answer from the legal materials, perhaps approaching them with a weak and rebuttable prior view that one position is correct. One would expect that to be true in cases involving relatively technical bodies of law that engage no strong moral sentiments, or perhaps in areas that are so infrequently litigated that the law is unfamiliar.

In other cases one would expect a judge to have strong intuitions, from the start, about how the case should come out. There is nothing necessarily wrong with this, at least as long as the judge is willing to change her mind if the legal materials, upon investigation, make it clear that the intuition is unsustainable. It is sensible, as well as inevitable, for people immersed in the legal culture to trust their intuitions about what the law must be before they have specifically investigated an issue.

The extraordinary litigation that led to the Supreme Court's decision in *Bush v Gore*[1] allows us to speculate, with more confidence than usual, about how the justices approached the issues presented by that case. The fast pace of the proceedings, and the relative novelty of the legal issues, made the justices' thought processes unusually visible. They could not, as they ordinarily would, wait for the lower court proceedings to be fully completed and take as much time as they needed before committing themselves publicly to a position. They had to respond to two separate decisions of the Florida Supreme Court very quickly and very publicly.

The conclusion that emerges, in my view, is that several members of the Court—perhaps a majority—were determined to overturn any ruling of the Florida Supreme Court that was favorable to Vice Presi-

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† Harry N. Wyatt Professor of Law, The University of Chicago. I am grateful to Michael Klarman and Richard Pildes for comments on an earlier draft, and to Crista Leahy for comments and expert research assistance.

1 121 S Ct 525 (2000) (per curiam).

dent Gore, at least if that ruling significantly enhanced the Vice President's chances of winning the election. They acted on the basis of strong intuitions—which, as I said, is by no means necessarily inappropriate in itself—but the intuitions were intuitions about the outcome, not about the law. The specific legal questions presented in the litigation were shifting, complex, and esoteric. It is hard to see how the justices could have strong legal intuitions about any of those specific questions. To the extent those questions raised familiar broad issues—like federalism and the relationship between the courts and the political process—the majority's reaction in this litigation contradicted their normal inclinations. During the litigation, the justices in the majority appear to have accepted, at one time or another, four different arguments offered by Governor Bush's lawyers, all of which were questionable—one of which, based on 3 USC § 5,[2] even the majority subsequently abandoned—but which had one common element: they required that the Florida Supreme Court be reversed. On the crucial remedial question that ensured Governor Bush's election, the majority's decision appears to be simply indefensible. And the majority opinion insisted that its rationale was to be applied, essentially, only in this case—basically conceding that the result, not the legal principle, dictated the outcome.

What explains this extraordinary behavior by the Supreme Court? The most plausible hypothesis, I believe, is that several members of the United States Supreme Court were convinced that the Florida Supreme Court would try to give the election to Vice President Gore and would act improperly if necessary to accomplish that objective. The governing intuition was that the Florida Supreme Court had to be stopped from doing this. The majority's actions in the litigation show a relentless search for some reason that could be put forward to justify a decision reversing the Florida Supreme Court. The outcome was a foregone conclusion.

If this is correct, then the United States Supreme Court's decision was not even on the continuum I described above. It was not comparable, for example, to judges' having an intuition that school segregation is unconstitutional, then groping for a theory that would justify that conclusion. School segregation was a familiar thing, as were the basic principles of the Equal Protection Clause. It is hard to believe that anyone on the Supreme Court really had strong intuitions about (or even more than a bare familiarity with) the provisions of Article II of the Constitution, or Title 3 of the United States Code, that played

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[2] 3 USC § 5 (1994). See text accompanying notes 9–10.

such a large role in the *Bush v Gore* litigation. The Equal Protection Clause was the ultimate basis for the decision, but the majority essentially admitted (what was obvious in any event) that it was not basing its conclusion on any general view of what equal protection requires. The decision in *Bush v Gore* was not dictated by the law in any sense—either the law found through research, or the law as reflected in the kind of intuitive sense that comes from immersion in the legal culture.

In the rest of this Essay, I will try to support this speculation. Perhaps the most obvious way to support it would be to demonstrate that the Court's decision was wrong on the merits. But that case has been made, not least by the dissenting opinions.[3] Besides, it is no sin for a court to get a case wrong, especially if the issues are complex and the time is brutally short. Other aspects of the litigation are, I believe, more revealing about how the justices approached this case, and I will examine them in Part I below.

Then in Part II, I will consider whether the majority, irrespective of whether it was following the law, was actually right about the Florida Supreme Court—and if so, whether the United States Supreme Court's decision might be, in some sense, justifiable. The argument in defense of the United States Supreme Court would have to be that it engaged in a kind of morally justified civil disobedience. It deliberately acted in a way that could not be legally justified in order to prevent some greater harm. I do not think that argument can be sustained. But it would be enough of a breakthrough if it were generally accepted that the United States Supreme Court's decision has to be justified, if at all, in those terms.

I. FIVE REVEALING ACTS

A. The Remedy

Seven justices concluded that the recount ordered by the Florida Supreme Court in the contest proceedings violated the Equal Protection Clause. A majority of the Court reasoned that the procedures under which the Florida Supreme Court proposed to conduct the recount "do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to vote.[4] Among other things, the majority said, the "intent of the voter" standard that the Florida court used, while "unobjectionable as an ab-

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3 *Bush v Gore*, 121 S Ct at 539 (Stevens dissenting); id at 542 (Souter dissenting); id at 546 (Ginsburg dissenting); id at 550 (Breyer dissenting).

4 Id at 530.

stract proposition and a starting principle," requires "specific standards to ensure its equal application."[5] "The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary."[6]

On the merits, this holding is very adventuresome—it goes well beyond anything the Court had previously said—but it is not wholly implausible. It would not have been shocking if the Warren Court had interpreted the Equal Protection Clause in this way (although there would no doubt have been much criticism of it for doing so). In fact, this interpretation can be seen both as an extension of the Warren Court's vision of democracy and as a logical implication of the view, seriously proposed a generation ago, that the Constitution limits the degree to which discretion can be vested in executive officials of both the state and federal governments.[7] For the majority of this Court, the equal protection holding was wildly out of character. And it seems very questionable for the Court to announce and apply a novel principle like this for the first time in a case that effectively decides a presidential election. But on the underlying merits, the Court's interpretation of the Equal Protection Clause was not indefensible.

What does seem indefensible is the Court's remedy. Of the seven justices who concluded that the recount procedures ordered by the Florida Supreme Court violated the Equal Protection Clause, two would have followed what seems like the normal course: a remand to allow the Florida Supreme Court to dispose of the case in a way that was consistent with both the United States Supreme Court's ruling and Florida law. But by a vote of five to four, the Court refused to allow the Florida Supreme Court to try to implement its ruling on remand. The majority stated that complying with the Court's ruling would require "substantial additional work."[8] It then reasoned as follows:

> The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5[, which] requires that any controversy or contest that is designed to lead to a con-

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5 Id.

6 Id.

7 See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (LSU 1969); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv L Rev 1521, 1521–22 (1981). A few court of appeals cases seemed to adopt this approach, but they were generally not followed. See, for example, *Holmes v New York City Housing Authority*, 398 F2d 262 (2d Cir 1968); *Hornsby v Allen*, 326 F2d 605 (5th Cir 1964).

8 *Bush v Gore*, 121 S Ct at 532.

> clusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. . . . Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18—contemplates action in violation of the Florida election code, and hence could not be part of an "appropriate" order authorized by [Florida law].[9]

The federal statute to which the Court referred—3 USC § 5, the so-called safe harbor provision—provides that when a state has made a "final determination of any controversy" concerning the appointment of electors "at least six days before" the date the electors meet in the state capital to vote, "such determination . . . shall be conclusive" on Congress.[10] By law the electors met on December 18, 2000, so December 12 was the cutoff for taking advantage of the safe harbor.

What the majority did in this passage was to attribute to the Florida legislature not just an intention to adhere to Section 5, but an intention to adhere to Section 5 at any cost. The majority said, in effect, that the Florida state legislature would want to take advantage of Section 5 even if that meant awarding the state's electoral votes to the candidate who lost the election—"lost" according to the state's election laws, as interpreted by the state's highest court and modified by any federal constitutional requirements. That is an unlikely intention for any legislature to have. Certainly one would expect that the legislature would rather send forward challengeable electoral votes for the winner of the state's popular vote, rather than unchallengeable votes for the loser. To attribute a contrary intention to Florida on the basis of a general statement in the Florida Supreme Court's opinion[11] is very strained. In fact, the Florida Supreme Court's opinion suggests, if anything, that it would *not* have wanted to abandon the effort to count votes; the majority of that court explicitly rejected the argument, advanced in a dissenting opinion, that "because of looming deadlines and practical difficulties we should give up any attempt to have the

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9 Id at 532–33.

10 3 USC § 5.

11 See *Gore v Harris*, 772 S2d 1243, 1261 (Fla Dec 8, 2000), revd and remd as, *Bush v Gore*, 121 S Ct 525.

election of the presidential electors rest upon the vote of Florida citizens as mandated by the Legislature."[12]

At the very least, it was uncertain what the Florida Supreme Court would have said if forced to choose between the safe harbor and continued counting. In the face of any uncertainty about the Florida legislature's intentions, for the United States Supreme Court to attribute such an unlikely intention to the Florida legislature without even remanding, to see what the Florida Supreme Court would say, is inexplicable—unless, of course, the United States Supreme Court simply did not trust the Florida Supreme Court to play it straight.

B. The Stay

On December 9, the Court, by the same vote of 5-4 that would ultimately decide the case, issued a stay of the Florida Supreme Court's second decision.[13] The effect of the stay was to stop the counting of the ballots ordered by the Florida Supreme Court. The Supreme Court's standard rule for granting a stay of a lower court's order is that the party seeking the stay must demonstrate a substantial probability of success on the merits, and the "balance of equities"—the harm faced by the petitioner if the stay is denied, compared to the harm to the respondent if the stay is granted—must favor the petitioner.[14]

By that measure, the stay seems impossible to justify. To begin with, it is not clear that the harm to Governor Bush should have carried any weight at all. Justice Scalia, in an opinion defending the stay, explained that "[t]he counting of votes that are of questionable legality . . . threaten[s] irreparable harm to [Governor Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election."[15] The premise of this argument is that there is a legitimate interest in suppressing truthful information—information about what the recount ordered by the Florida Supreme Court would have disclosed—in order to protect the President of the United States from political harm. Ordinarily it is a fundamental principle of our system of freedom of expression that the government cannot limit what people hear about politics because it mistrusts their ability to evaluate that information rationally. The majority's apparent conclusion that

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12 *Palm Beach County Canvassing Board v Harris*, 772 S2d 1220, 1261–62 n 21 (Fla Nov 21, 2000), vacd and remd as, *Bush v Palm Beach County Canvassing Board*, 121 S Ct 471 (2000) (per curiam).

13 *Bush v Gore*, 121 S Ct 512 (2000) (application for stay).

14 See, for example, *Rubin v United States*, 524 US 1301, 1301 (1998) (discussing the conditions under which stays should be granted).

15 *Bush v Gore*, 121 S Ct at 512 (Scalia concurring).

then-Governor Bush had a legitimate interest in suppressing certain information may not be wholly unsupportable, but it is at least problematic.

But if one accepts the possible political damage to Governor Bush as a legitimate harm, the potential harm to Vice President Gore was vastly greater. Had Vice President Gore prevailed on the merits in the Supreme Court, the stay might easily have deprived him of his victory, by preventing the counting of the ballots before the electors were to cast their votes on December 18. It is true that the failure to grant a stay might have inflicted political damage on a Bush presidency; but granting a stay might have wholly deprived Vice President Gore of the presidency.

There is only one circumstance in which the balance of equities might have favored Governor Bush: if a majority of the Supreme Court had already decided how it was going to rule. If there had been any chance that the Vice President would win in the Supreme Court, the stay was indefensible. But if it were a foregone conclusion that the Florida Supreme Court's decision would be reversed, even the administrative expense of counting might justify a stay. In addition, if five justices had already made up their minds that they were going to rule in favor of Governor Bush, the stay, however controversial, ensured that they would not be in the awkward position of reversing an apparent Gore victory. The hypothesis that best explains the majority's decision to grant a stay despite the imbalance in the equities and the questionable nature of Governor Bush's interest is that the majority knew, when it granted the stay, how the case would come out.

That, too, is not necessarily a reason to criticize the justices. It is probably pretty common for justices to know, from reading the certiorari petition, how they will vote in a case. But this was not a run of the mill case presenting a slight variant on a subject that the justices have thought about dozens of times. The Florida Supreme Court's decision in *Bush v Gore* concerned a state election law statute with which the justices surely had no prior familiarity—even from *Bush v Palm Beach County Canvassing Board*,[16] which concerned an entirely different state statute. Governor Bush's arguments also drew on broader aspects of Florida election law and Florida administrative law; he argued, for example, that the Florida Supreme Court should have required deference to the decisions of the county canvassing boards even though the contest statute did not say that explicitly. The equal protection argument that was the basis of the majority's opinion de-

16 121 S Ct 471 (2000) (per curiam).

pended on a detailed familiarity with the facts about the various recounts that had been underway, as well as an assessment of what was "practicable."[17]

The Florida Supreme Court issued the opinion at 4:00 p.m. on December 8.[18] The United States Supreme Court granted the stay at 2:45 p.m. on December 9.[19] In less than twenty-three hours, five justices evidently had decided that Governor Bush was sure to prevail, because in view of the harm to the Vice President, the stay could not possibly be justified if there had been any doubt. The justices reached this decision even though they had little or no prior familiarity with the state law involved, and even though they were acting on the basis of a very hastily prepared stay application and opposition. It is hard to resist the conclusion that they knew all along what they were going to do.

C. The Grant of Certiorari in *Bush v Palm Beach County Canvassing Board*

Governor Bush's certiorari petition in *Bush v Palm Beach County Canvassing Board* relied primarily, and very heavily, on 3 USC § 5. Section 5 was the basis of the first question presented in the petition, and the twenty-seven page petition did not begin to discuss any other arguments until page eighteen.[20] This is a pretty clear indication that Governor Bush's lawyers thought Section 5 provided their best argument by far. That argument—repeatedly asserted in the petition—was that Section 5 forbade Florida from altering its election laws after the date of the election.[21] This passage—the emphasis is in the original—is representative:

> The application of 3 U.S.C. § 5 in these circumstances is straightforward. . . . [T]his Court has not previously been called upon to decide whether or not the States must adhere to preexisting law in resolving election disputes. But the plain language of the federal statute indicates that they *must* do so.[22]

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17 *Bush v Gore*, 121 S Ct at 530.

18 *Gore v Harris*, 772 S2d 1243 (Fla Dec 8, 2000), revd and remd as, *Bush v Gore*, 121 S Ct 525.

19 *Bush v Gore*, 121 S Ct 512.

20 Petition for Writ of Certiorari, *Bush v Palm Beach County Canvassing Board*, No 00-836, *27 (filed Nov 22, 2000) (available on Lexis at 2000 US Briefs 836).

21 Id at *12.

22 Id at *18. For similar statements, see, for example, id at *17–22; id at *12 (stating that "[t]he evident purpose of this federal law is to ensure that the applicable rules cannot be changed once the voters have gone to the polls"); id at *13 (noting "the express federal statutory

This interpretation of Section 5 is wrong. No one, now, believes otherwise. Section 5 does not prohibit states from "changing the rules"; it just provides that the consequence of doing so is that their choice of electors may be challenged before Congress. This is in fact clear from the language of the statute, once one untangles its syntax, and by the time *Bush v Gore* was decided even the three justices who concluded that the Florida Supreme Court had changed the law did not assert that that court's action was forbidden by Section 5.

Governor Bush's lawyers really cannot be faulted for writing the petition as they did. They were scrambling, under enormous time pressure, to find some basis to get the Supreme Court involved in what was really a dispute over the meaning of state law, and like almost everyone else they did not have prior familiarity with the esoteric provisions of Title 3. In fact, Vice President Gore's brief in opposition to the petition did not recognize the plain error in the interpretation of Section 5.[23] In his brief on the merits, Vice President Gore did demonstrate that Section 5 was only a safe harbor;[24] in fact, by the time Governor Bush's lawyers wrote their brief on the merits, they had realized, too, that they had gone too far, and their Section 5 arguments in the merits brief were much more hedged.[25]

But if one cannot fault the lawyers, one can certainly raise concerns about the actions of the Supreme Court, which made a very questionable decision to intervene in the litigation on the basis of a misunderstanding of the law—and an even more questionable decision not to back out when its misunderstanding became clear. The Court granted certiorari on the question presenting the Section 5 issue. (It also agreed to review a question raising an Article II issue, but it did not grant certiorari on the question in the Bush petitions that raised the Equal Protection Clause issue.[26]) The Court then instructed the parties to address the question: "What would be the consequences of this Court's finding that the decision of the Supreme Court of Flor-

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prohibition against the *post hoc* creation of new legal rules"); id at *15–16 ("Congress's federally imposed requirement that controversy over the appointment of electors be resolved solely under legal standards 'enacted prior to' the date of the election.").

23 See Brief in Opposition to Petitions for Writs of Certiorari, *Bush v Palm Beach County Canvassing Board*, No 00-836, *6 (filed Nov 24, 2000) (available on Lexis at 2000 US Briefs 836).

24 See Brief of Respondents Al Gore, Jr., and Florida Democratic Party, *Bush v Palm Beach County Canvassing Board*, No 00-836, *1 (filed Nov 28, 2000) (available on Lexis at 2000 US Briefs 836).

25 See Brief for Petitioner, *Bush v Palm Beach County Canvassing Board*, No 00-836, *12–13 (filed Nov 28, 2000) (available on Lexis at 2000 US Briefs 836).

26 See Petition for Writ of Certiorari, *Bush v Palm Beach County Canvassing Board* at *i (cited in note 20) (available on Lexis at 2000 US Briefs 836); *Bush v Palm Beach County Canvassing Board*, 121 S Ct 510 (2000) (granting writ of certiorari).

ida does not comply with 3 U.S.C. Section 5?"[27] This question reflects a misunderstanding of Section 5; if the Court had understood that Section 5 was most plausibly understood only to create a safe harbor, it would have asked the parties to address directly the question whether Section 5 did more than that. The Court's actions also suggested that the Court believed the Section 5 issue would be the central issue in the case.

The Court's decision to grant certiorari was very surprising to most observers, and it was a highly significant event. Among other things, it gave credibility to the extremely harsh attacks that Governor Bush's representatives made on the Florida Supreme Court. There was no obvious legal reason for the Court to intervene; that is why its decision to do so surprised most observers. The central issues were ones of state law and, as their treatment of Section 5 shows, even Governor Bush's lawyers, with every incentive to find a federal question in the case, struggled to do so.

In these circumstances—a highly charged political context raising difficult issues of state law and no obvious issues of federal law—the Supreme Court would ordinarily operate with a strong presumption against granting certiorari. That is what it should have done in this case. Its attitude should have been that unless it found a compelling argument that the Florida Supreme Court violated federal law, it would stay out of the case. It did not find such an argument; if it had, it would not have focused the parties' attention on an argument that turned out to be plainly wrong. To put the point another way, before it made a grant of certiorari that was momentous in itself, the Supreme Court should have examined the Section 5 argument carefully enough to discover the error that soon became clear to everyone. The fact that it didn't is another indication that the Court was reacting viscerally on the basis of an inchoate sense, not grounded in any legal principle, that something had to be done.

D. The Ruling in *Bush v Palm Beach County Canvassing Board*

The Court's decision in *Bush v Palm Beach County Canvassing Board* bears out the impression that a majority of the justices, having made up their minds that the Florida Supreme Court's decision should not be allowed to stand, was seeking only a suitable means of overturning it. By the time of the oral argument, no justice was receptive to the interpretation of Section 5 that had been put forward in the petition. Chief Justice Rehnquist and Justice Scalia, however, raised, at

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[27] *Bush v Palm Beach Canvassing Board*, 121 S Ct at 510.

argument, the question whether the Florida Supreme Court had violated Article II, Section 1 by relying on the state constitution in interpreting state voting laws.[28] The Court subsequently issued a unanimous opinion vacating the decision of the Florida Supreme Court and remanding the case to that court, principally to determine if the Florida Supreme Court had relied on the Florida Constitution. The Supreme Court explained its remand by saying that "[t]here are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'"[29]

This decision was praised as statesmanlike by some, and it did temporarily paper over the sharp disagreements among the justices that surfaced at the argument. But in other respects the decision was anything but a careful and prudent use of the Supreme Court's power.

It is, for example, entirely clear that the Court did not grant certiorari in order to address the issue on which it remanded. Not only was the Court focused on 3 USC § 5 when it granted certiorari, but—more significantly—the petition did not at any point argue that the Florida Supreme Court violated Article II by relying on the provisions of the Florida Constitution.[30] That argument, which later persuaded the Court, did not merit as much as a single sentence in the certiorari petition. If the Court had granted the petition in order to consider this question, it would have directed the parties to address it specifically, as it directed the parties to address a question that it mistakenly thought was raised by 3 USC § 5.

When the Court realized that it had agreed to review the case on the basis of a misunderstanding of the law (that is, of 3 USC § 5), it might have done one of several things. It might have dismissed the writ as improvidently granted. If that were too embarrassing, the Court might have found some other ground to dismiss the writ; for example, by the time of the Court's decision, the case was at least close enough to being moot to justify dismissing the petition. Conceivably, once it decided that the important issue was one that both it and the parties had all but ignored, it could have asked for briefing on that issue. But the Court did none of those things. Instead, it appears to have

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28 Transcript of Oral Argument, *Bush v Palm Beach County Canvassing Board*, No 00-836, *50–51 (Dec 1, 2000) (available on Lexis at 2000 US Trans Lexis 70).

29 *Bush v Palm Beach County Canvassing Board*, 121 S Ct at 474, quoting *McPherson v Blacker*, 146 US 1, 25 (1892).

30 The issue was comprised within one of the questions presented in the petition and therefore was technically before the Court, but it was not argued in the petition in any form.

issued as severe a rebuke to the Florida Supreme Court as it could, while still maintaining unanimity.

There were several things wrong with this course of action. First, the constitutional question is in fact a complex one. It is far from clear what the relationship is between a state's constitution and the power that a state "legislature" may exercise under Article II, Section 1 to "direct" the "manner" in which electors are appointed. Presumably a state constitution may not itself direct how electors are chosen, at least if the constitution is not the work of the legislature.[31] But the other polar position—that a legislature may wholly disregard the state constitution when it directs how electors are appointed—cannot possibly be correct. A state legislature is a creature of the state constitution: You cannot tell the difference between a state's real legislature and a group of usurpers without looking at the state constitution. Beyond that, state constitutions often specify such things as when the legislature meets, how it is convened and adjourned, what constitutes a quorum, and so on.[32] It would be very surprising if a state legislature could simply ignore such state constitutional provisions when it was directing the manner in which presidential electors are appointed. Determining the ways in which a state constitution may and may not limit the legislature's decisions about presidential electors will, therefore, be a difficult and complex task.

Second, as the Court must have been aware, its decision was generally viewed as resolving—not just raising—the question whether Article II, Section 1 precludes state constitutional limits on legislative action. The Court did not even acknowledge that some state constitutional limits on legislative power would be unproblematic, much less explain where the line might be drawn between acceptable and unacceptable limits. The Court's formulation of the reason for vacating the Florida Supreme Court's decision—"we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2"[33]—was quite naturally taken to mean that any such "circumscription" might be unconstitutional. Thus the effect of the Supreme Court's remand

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31 Vice President Gore's lawyers argued that the Florida Constitution is in fact the work of the legislature, thus making the issue even more complex and the Court's conclusion even more questionable. See Brief For Respondents Al Gore, Jr., and Florida Democratic Party, *Bush v Palm Beach County Canvassing Board*, No 00-836, *42–43 (filed Nov 28, 2000) (available on Lexis at 2000 US Briefs 836).

32 See, for example, Fla Const Art III, § 3, cl a–c (specifying when the legislature meets); id cl c, e (specifying how the legislature is convened and adjourned); id § 4, cl a (specifying what constitutes a quorum).

33 *Bush v Palm Beach County Canvassing Board*, 121 S Ct at 475.

was not only to suggest that the Florida Supreme Court had acted unconstitutionally but to affect the further proceedings in that court.

Finally, the decision of the Florida Supreme Court by no means forced the United States Supreme Court to confront this question. The Florida Supreme Court did not declare that something the legislature had done was unconstitutional under the state constitution. At worst, the Florida Supreme Court relied on the state constitution for general principles of a kind that could easily be seen as part of the background against which the legislature knowingly enacted the Florida election laws—which is how the Florida Supreme Court explained its opinion on remand. Significantly, Governor Bush did not press this argument at any point in the litigation until it was raised by members of the Court. The argument was, as I said, not mentioned at all in the petition; it was made perfunctorily in Governor Bush's merits brief (in only three paragraphs, on page forty-seven of a fifty page brief); and it was not mentioned at oral argument until members of the Court brought it up.

In other words, the Court—having evidently granted certiorari under a misapprehension about 3 USC § 5—issued a politically sensitive decision that was bound to be misinterpreted on a complex question that was not squarely raised, not adequately briefed, and not aggressively pushed by the petitioner. Why did the Court do this? In theory, because it was possible (although very unlikely) that the Florida Supreme Court would acknowledge that its decision relied on the state constitution to reject a legislative directive, and because it was possible (although again unlikely) that such a decision, on the basis of the kind of general principles discussed in the Florida Supreme Court's opinion, might transgress constitutional limits that the United States Supreme Court did not seriously try to define. As an exercise of the Supreme Court's certiorari jurisdiction, this is irregular to the point of being inexplicable. As an effort to thwart, by any means necessary, a perceived illegitimate act by the Florida Supreme Court, it begins to make sense.

E. The Equal Protection Holding, Limited "to this Case"

The Court's own statements provide the final piece of evidence that the Court was responding not to any legal principle but to a perception that something needed to be done in this particular case. *Bush v Gore* held that the recount procedures mandated by the Florida Supreme Court "do not satisfy the minimum requirement for non-

arbitrary treatment of voters."[34] The Court identified a number of aspects of the ruling that seemed arbitrary to it—for example, that the lower court included in the vote totals partial recounts from some counties, and manually recounted overvotes from some jurisdictions but not others.[35] But those problems could have been cured by directing the Florida Supreme Court to modify the vote totals; they did not justify the United States Supreme Court in holding that the recount could not go forward.

That aspect of the Court's holding, which may have determined the outcome of the presidential election, was justified on the basis of a plausible but potentially far-reaching principle: that at least where the right to vote is concerned, the states may not use discretionary standards if it is practicable to formulate rules that will limit discretion. In particular, the Court concluded that the standard that the Florida Supreme Court specified to govern the counting of votes—that the intention of the voter be honored—is "unobjectionable as an abstract proposition" but requires "specific standards to ensure its equal application."[36] The Court acknowledged, of course, that discretionary inquiries into intent are common in many areas of the law. But it said that here, "[t]he search for intent can be confined by specific rules designed to ensure equal treatment."[37]

This is a recognizable principle: a state must make decisions according to rules, rather than according to discretionary standards, at least when the costs of doing so are not too great. The Court's decision to limit this principle to voting—rather than to allow it to be extended to, for example, the criminal justice system, where it might have dramatic effects—is at least supported by precedent, which can be read to treat voting rights differently from most other individual interests.[38] Even as applied to voting rights, this principle would have far-reaching implications given the ubiquity of the "intent of the voter" standard[39] and the wide local variations in voting and tabulation mechanisms and

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34 *Bush v Gore*, 121 S Ct at 530.

35 Id at 531–32.

36 Id at 530.

37 Id.

38 See, for example, *Kramer v Union Free School District No 15*, 395 US 621, 626 (1969) (holding that the right to vote lies at "the foundation of our representative society" and classifications with regard to that right to vote are subject to strict scrutiny); *Harper v Virginia Board of Elections*, 383 US 663, 665 (1966) ("[T]he right to suffrage is subject to the imposition of state standards which are not discriminatory.").

39 See *Bush v Gore*, 121 S Ct at 541 (Stevens dissenting); Brief of Respondent Albert Gore, Jr, *Bush v Gore*, No 00-949, *36 (filed Dec 10, 2000) (available on Westlaw at 2000 WL 1809151).

the like. But the effects would probably not be more dramatic than, say, those of the Court's reapportionment decisions of the 1960s.[40]

The problem is that the Court was not interested in the principle. It went out of its way to try to limit its ruling to the facts of *Bush v Gore*. The Court said that it was ruling only on "the special instance of a statewide recount under the authority of a single state judicial officer"[41]—without explaining why this was a special instance, different from all other aspects of the electoral process. The Court then tried even harder to limit its holding:

> Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount.[42]

There is no obvious reason—and the Court gave none—for using a different rule when a state legislature "with the power to assure uniformity" is acting, or for why the recount itself does not present as many "complexities" as other aspects of voting, or why "local entities, in the exercise of their expertise" could not "develop different systems for implementing" the voter intent standard.

The Court's attempt to limit its holding, with barely a fig leaf of principle, gives the game away. The majority was not concerned with principle. It smelled a rat in this case. It thought the Florida Supreme Court was up to no good. It could not explain what the Florida Supreme Court was up to in terms that engaged general principles that it was willing to embrace, but it was determined to intervene and stop that court. If the actions of the United States Supreme Court are to be defended, they must be defended in those terms.

II. WAS IT JUSTIFIED?

The most straightforward way to determine whether the Florida Supreme Court was acting in such an illegitimate way as to warrant the United States Supreme Court's intervention is, of course, to consider the merits of the issues. The United States Supreme Court's ruling on the equal protection issue, although potentially defensible in

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40 See *Reynolds v Sims*, 377 US 533, 555 (1964); *Wesberry v Sanders*, 376 US 1 (1964).

41 *Bush v Gore*, 121 S Ct at 532.

42 Id.

principle, was certainly novel, and surely the Florida Supreme Court did not act illegitimately when it failed to anticipate that ruling. Most of the attacks on the Florida Supreme Court's decision instead seem to assert—as the three-justice concurring opinion did in *Bush v Gore*—that that court's interpretation of Florida election law was so indefensible that it violated Article II, Section 1. The merits of this position have been extensively discussed, beginning in the opinions themselves, and there seems little to add.

One point should be emphasized, however. The Florida Supreme Court decision that was overturned in *Bush v Gore* was consistent with the plain language of the principal statute involved—the Florida statute governing contests of election certifications[43]—and neither the concurring opinion nor, as far as I am aware, anyone else, has seriously contended otherwise. Richard A. Posner specifically addresses this argument in his contribution to this symposium, but his remarks betray the weakness of his position.[44] Judge Posner does not contend that the Florida Supreme Court's interpretation of the contest statute is inconsistent with its plain meaning. Judge Posner says that the term "error in vote tabulation" has a plain meaning. That seems implausible to me, but in any event that term occurs in the protest statute, not the contest statute, and was not at issue in *Bush v Gore*.

In fact, Judge Posner's suggestion that I misunderstand the "'plain meaning' interpretive principle" neatly reveals where the argument in his Essay goes wrong. That principle bears on the question whether the Florida Supreme Court correctly interpreted Florida law. But that question was not before the United States Supreme Court. The position of the three concurring Justices was a usurpation precisely because they—like Judge Posner—acted as if that were the question. The question before the United States Supreme Court was whether what the Florida court did was so far wrong that it violated Article II, Section 1—and for purposes of *that* question, the fact (implicitly conceded by Posner) that the Florida court's action was consistent with the plain meaning of the contest statute is a strong point in the Florida court's defense. That statute provides that "rejection of a number of legal votes sufficient to change or place in doubt the result of the election" is a "ground[ ] for contesting [the] election."[45] The statute does not define what a "legal vote[ ]" is. The statute also includes an exceptionally broad grant of power to the trial court: "The circuit judge to whom the

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43 Fla Stat Ann § 102.168 (West 2000).

44 Richard A. Posner, Bush v Gore*: Prolegomenon to an Assessment*, 68 U Chi L Rev 719, 730 n 37 (2001).

45 Fla Stat Ann § 102.168(3), (3)(c).

contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances."[46] It is not eccentric, as a matter of English usage, to say that a "legal vote" has been "reject[ed]" when a ballot is not counted in accordance with the intentions that the voter indicates on it. The election in Florida was close enough that those rejected votes "place[d] in doubt the result of the election."[47] And the procedures that the Florida Supreme Court ordered were well within the broad remedial power granted by the statute.[48]

The fact that there is a plain language defense for the Florida Supreme Court's action does not establish that the Florida Supreme Court's decision was correct—although the concurring opinion asserted that under Article I, Section 2, "the text of the election law itself . . . takes on independent significance."[49] But unless there is at least a clearly settled line of precedent to the contrary—which there was not in Florida; among other things, the contest statute had been extensively revised in 1999—the fact that the Florida Supreme Court's decision was consistent with the plain language of the contest statute should be enough to show that that court was not acting in a fundamentally illegitimate way that warranted the United States Supreme Court's determined effort to derail it.

The concurring opinion's attack on the Florida Supreme Court was that the Florida court interpreted the contest statute in a way that fit badly with the provisions of Florida law that allow for a "protest" before votes are certified.[50] The relationship of the "protest" and the "contest" statutes is an obvious concern; indeed, from the face of the contest statute it looks as if a judge could intervene in almost any

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46 Id § 102.168(8).

47 Id § 102.168(3)(c).

48 Those powers are granted to the trial judge, but in exigent circumstances, it is not extraordinary for an appellate court to direct a lower court to exercise its discretion in a certain way. The Florida Supreme Court did leave the trial court supervising the recount with substantial discretion; that discretion was part of what led the majority to find an equal protection violation. Neither the concurring opinion nor, so far as I am aware, anyone else, has shown that the Florida legislature meant to prevent the Florida Supreme Court from exercising the normal range of appellate powers over the lower courts in this case.

49 *Bush v Gore*, 121 S Ct at 534. The full quotation is: "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." It is not clear why the concurring opinion said this. If a legislature acted with the understanding that courts would interpret statutes in a way that did not follow "the text . . . itself," then attaching significance to the text, rather than judicial interpretations, would defeat the legislature's intentions, presumably in contravention of Article I, Section 2.

50 See Fla Stat Ann § 102.166 (West 2000); *Bush v Gore*, 121 S Ct at 536–37.

close election. The Florida Supreme Court tried to come to grips with this problem, holding, for example, that the decisions of the canvassing boards at the protest stage would be evidence admissible in the contest proceedings.[51] This is not the only plausible reading of the Florida statutory scheme—the dissenters in the Florida Supreme Court, and the concurring opinion, thought the canvassing boards should get more deference—but so far as I am aware no one has identified either a statute or a precedent that precludes the Florida Supreme Court's view.

Beyond the substantive merits of the case, there are other indications that the Florida Supreme Court was not simply trying to ensure that Vice President Gore would win the election. On several occasions, the Florida Supreme Court ruled against Vice President Gore on important issues. For example, before the election results were certified, the Florida Supreme Court rejected Vice President Gore's effort to require Miami-Dade County to resume the recount it had started, then stopped. The Vice President believed that the remaining votes in that county would give him the statewide lead. It is not out of the question—and at the time it seemed entirely possible, indeed perhaps probable—that the Florida Supreme Court's decision on this issue cost the Vice President the election.

Later, the Florida Supreme Court summarily affirmed lower court decisions from Seminole and Martin Counties. In those cases, Republican Party officials were shown to have engaged in clearly improper conduct in the handling of absentee ballots. The trial courts nonetheless denied relief, holding that the election results were not tainted.[52] The clear impropriety might well have provided an opening for the Florida Supreme Court to rule in favor of the Vice President, had it been seeking opportunities to do so. The Florida Supreme Court also upheld a lower court decision that refused to declare the Palm Beach County "butterfly ballot" unlawful and to order a revote.[53]

Finally, in the contest case that led to the United States Supreme Court's decision in *Bush v Gore*, the Florida Supreme Court rejected several claims by the Vice President that were at least colorable. The Supreme Court refused to intervene when Vice President Gore complained that the trial judge—whom the Supreme Court ultimately reversed—was proceeding too slowly, even though it was clear that the

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51 *Gore v Harris*, 772 S2d 1243, 1252 (Fla Dec 8, 2000), revd and remd as, *Bush v Gore*, 121 S Ct 525.

52 *Taylor v Martin County Canvassing Board*, 773 S2d 517 (Fla Dec 12, 2000).

53 *Fladell v Palm Beach County Canvassing Board*, 772 S2d 1240 (Fla Dec 1, 2000).

passage of time could be fatal to the Vice President's chances.[54] This was a self-defeating thing for the Florida Supreme Court to do, if it simply wanted to ensure the Vice President's election. When it heard the case on the merits, the Florida Supreme Court rejected the Vice President's argument that 3,300 votes from Palm Beach County that had been manually counted should be recounted.[55] The Florida Supreme Court also rejected the Vice President's argument that Nassau County authorities acted improperly by refusing to certify the vote totals disclosed by a mandatory machine recount, reverting instead to the initial machine count that was more favorable to Governor Bush.[56] David Boies, the Vice President's lead counsel, regarded this as such a strong claim that he said beforehand, "If I can't win that argument, I'm going to give up the practice of law."[57]

Of course, these rulings may simply have been in accordance with the law. Certainly the fact that the Florida Supreme Court ruled against Vice President Gore on some occasions does not establish that its rulings in his favor were correct. But the United States Supreme Court, I have argued, was not prompted by a reasoned judgment that the Florida Supreme Court made specific legal errors. The United States Supreme Court's actions seem to be the product of a general sense that the Florida Supreme Court was illegitimately manipulating the law to ensure that Vice President Gore won. Even if the Florida Supreme Court was doing so, that would not by itself justify the actions of the United States Supreme Court: one of the consequences of a federal system of government is that sometimes state authorities will abuse their power in ways that the federal government is powerless to correct. But the fact that the Florida Supreme Court passed up opportunities to rule in favor of Vice President Gore, even when it was plausible to do so and when such a ruling would have greatly helped him, is evidence that the United States Supreme Court's perception was wrong.

CONCLUSION

No one, not even the most enthusiastic supporter of Governor Bush's campaign, should feel entirely comfortable with the result in

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54 *Palm Beach County Canvassing Board v Harris*, 772 S2d 1220, 1240 (Fla Nov 21, 2000), vacd and remd as, *Bush v Palm Beach County Canvassing Board*, 121 S Ct 471.

55 *Gore v Harris*, 772 S2d 1243, 1259–60 (Fla Dec 8, 2000), revd and remd as, *Bush v Gore*, 121 S Ct 525.

56 *Gore v Harris*, 772 S2d at 1260.

57 David Firestone and David Barstow, *Counting the Vote: The Overview: Florida Legislature Plans to Enter Legal Fray, Backing Bush's Suit*, NY Times A1 (Nov 25, 2000).

Bush v Gore. If I am right about what the Supreme Court did, then the best that can be said is that the Court trumped the supposed lawlessness of the Florida Supreme Court with lawlessness of its own. As I have suggested, I do not believe the United States Supreme Court had adequate reason to suspect the Florida Supreme Court of a nakedly partisan effort to "steal" the election. But the more troubling question is whether, even if the justices' view of the Florida Supreme Court was correct, they were justified in acting without really being concerned about whether they had a sound legal basis for doing so.

Judges, like everyone else, sometimes act on instinct. That is inevitable and, as I said at the outset, often unobjectionable, within limits. But a close election is sure to inflame partisan passions and to skew judgment in a partisan direction. That makes it all the more important for judges to hesitate, to question their own motives, and to make sure that their judgments have a solid basis in the law before they act. That may be a lot to expect. But if there is any court of which we should expect it, it is the United States Supreme Court. In *Bush v Gore*, a majority of the Court, prompted by a general and unjustified sense that something needed to be done, plunged in, splintered along ideological lines, and played a prominent role in deciding the election. This was not a triumph for the rule of law.